(3)

No. 90-1002

IN THE

SUPREME COURT

OF THE UNITED STATES

October Term, 1990

RICHARD G. KASCHAK,

Petitioner,

vs.

SUPERIOR COURT OF CALIFORNIA,
COUNTY OF KERN

Respondent,

PINE MOUNTAIN CLUB PROPERTY
OWNER'S ASSOCIATION

Real Party
In Interest.

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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March 4, 1991

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RESPONSES & ARGUMENT PRESENTED

Respondent's Late "Reply" brief was received February 19, 1991.

On this same date, petitioner wrote and mailed certified letter to Office Of The Clerk, Supreme Court Of The United States, asking if this undated "Reply" brief was in valid full compliance with Rules Of The

Supreme Court, and petitioner's Petition For A Writ Of Certiorari which was accepted & docketed on December 15, 1990.

On February 26, 1991, via telephone, petitioner was informed that respondent's "reply" had been accepted & docketed accordingly.

Thus the county counsel has now filed a "Reply" for the Superior Court to the petition filed herein. As of this writing, the Real Party In Interest, Pine Mountain Club, has not filed a brief, and the time for filing has now expired accordingly. Petitioner wishes however, to reply to the county's brief as provided by Rule 15.6. No factual matter asserted by Petitioner has been controverted. Rule 15.1.

I.

THE OPPORTUNITY TO CONFRONT AND CROSS-EXAMINE WITNESSES IS A RIGHT

The counsel for the Superior Court makes the surprising argument that the provisions of California Rule Of Court 323 are the equivalent of the right to confront and cross-examine witnesses. Brief, p. 6.

Rule 323 permits a litigant to apply for permission to introduce oral evidence at a law and motion hearing upon 3-days written notice to the court. The application is addressed, however, to " the court's discretion for good cause shown..." Rule 323. But the general rule remains that "Evidence received at a law and motion hearing shall be by declaration....without testimony or cross-examination." Rule 323.

But, plainly, Petitioner is asserting a right required by the due process clause as it applies to the States under the Fourteenth Amendment. For the County to argue that petitioner "cut(s) his own throat" because Rule 323 gives him the "opportunity" to cross-examine witnesses, an opportunity petitioner "waived", is specious, if not cynical. (See Brief, p. 11). Clearly, the County seeks to resurrect the discredited distinction between right and privilege, and, to equate the two. It seems plain that if a right depends for its exercise upon judicial discretion, we are not properly speaking of a right at all, but of a privilege. For a right is guaranteed by the Constitution and does not owe its existence to judicial discretion.

It exists independent of the judiciary which must recognize it, i.e., it is a claim on the judiciary and operates as a limitation of the judicial power.

Therefore, the County cannot equate the "opportunity" to apply with the "opportunity" to actually cross-examine. See Brief p. 9. Surely, the County is obfuscating, because Goldberg v Kelly (1970) 397 U.S. 254, and the other cases cited, make clear that "Due Process' requires the opportunity to confront and cross-examine witnesses..." Ibid, at 269. (Emphasis added.)

Furthermore, it must be noted that the rule cited only applies to the introduction of "oral evidence." Rule 323, Brief, p. 7.
There is no provision for obtaining cross-examination and confrontation of witnesses. This interpretation is

buttressed by the rule's requirement that a written statement setting forth the nature and extent of the evidence "be submitted 3 court days before the proposed hearing." This is more easily done with direct testimony than with cross-examination. Afterall, in summary proceedings, such as those contemplated by the Rule, there is No discovery. Because of this, it is almost impossible to predict what evidence cross-examination would elicit. And,additionally, demeanor plays such an important role on cross-examination that falsity can only be detected by the manner of its presentation, not its contents. In short, the additional requirement of a proposed written statement is a needless handicap, if not an impossibility, and in most cases,

a superfluity. Clearly, this right should not be so qualified that it is practically impossible to obtain accordingly.

Finally, the Goldberg requirement is of confrontation itself. That is, wholly apart from what a litigant may think the evidence will be, the litigant has the right to confront the witness, i.e., that is the right to confrontation is distinct from the right to cross-examine, though they are closely related. The point is, of course, that this right to confrontation is not subject to separate considerations of what the witness has to say. The case cannot be tried in absentia. Declarations are no substitute for the witnesses being sworn in open court and identifying their testimony as

their own. Chicago Ridge Theatre Limited Partnership v M & R Amusement Corp., 855 F 2d 465, 468 (7 Cir. 1988).

In sum, it is obfuscatory for the County to equate the opportunity to apply for a hearing with actual opportunity to confront and cross-examine the witnesses. Goldberg, at 268.

For the County to then conclude that by failing to apply for a hearing, the Petitioner "waived" his right to one (Brief, p. 11) turns the record on its head. First, of course, waiver is the relinquishment of a known right; there is no evidence that Petitioner knew of this "right to apply." Secondly, the facts of the petition show that Petitioner asked to cross-examine the witnesses at the hearing.

The County does not dispute this. Rule 15.1. The denial then formed the basis of his appeal. To hold a waiver in this context would simply be dumbfounding.

II.

CALIFORNIA LAW IS NOT DETERMINATIVE

The County, again-almost gymnastically, asserts that California case law and statute permit motions to be determined on declarations alone, (Brief, p. 8) and that California has not interpreted the Sixth Amendment to require cross-examination and confrontation in anything but a criminal action (Brief, p. 10). But, in the first place, the question is one of Federal, not State, law, and secondly, the right claimed here arises under the Fourteenth Amendment; not the Sixth Amendment. Thus the County begs the

question in the first instance (if it doesn't reverse it) and, in the second instance, it misplaces the locus of the guarantee. The County asserts Petitioner cites no authority for its position (Brief, p. 10) but Petitioner, in addition to Goldberg, cited Sniadach v Fairly Finance Corp. Of Bay View, 395 U.S. 337 (1968), which clearly speaks of the right to a hearing, and impliedly of confrontation, as grounded in the "Due Process" Clause of the Fourteenth Amendment even in a civil proceeding. Put differently, the question is of Federal Law, not State Law, and therefore the Supreme Court, not the Court Of Appeal of California (an intermediate appellate court in any event), is the final arbiter.

The State's interpretation must yield to the Supreme Court's; not vice versa.

III.

HEARSAY IS OBJECTIONABLE

Finally, in Point IV of its brief, the County concedes that the Petitioner, In Propria Persona, attacked "the declarations as hearsay, but made no objection to the declarations or a proper motion to strike."Brief, p. 13. Can the county seriously maintain such a fine distinction?
Surely it exalts form over substance to maintain that an attack on hearsay is not the equivalent of an "Objection" to it. It further stretches the logic to then conclude, as the county does (Brief, pp. 13-14), that "incompetent" evidence becomes "competent" upon the failure to

properly object. The county confuses hearsay and competency. Some hearsay, the admissible exceptions, are obviously sufficiently reliable to be considered, and are therefore "competent". Other hearsay, for which, as here, there are no exceptions, is inherently unreliable and, therefore, is incompetent, even if relevant. But this court has held that mere uncorroborated hearsay is not substantial evidence. Consolidated Edison Co. v N. L. R.B., 305 U.S. 197 (1938). That is, this court has held that hearsay even if admitted into evidence cannot by itself be sufficient to support a judgment. Incompetent hearsay does not alchemically change into competent evidence as a function of its acceptance into evidence.

It remains incompetent, unable by itself to prove its contents. This again is a question which must be decided in relation to "Due Process", not to mere rules of evidence. Again, a Federal question, not a State question, is presented, and State law is not, therefore, final.

The matter was put to rest, however, when Justice Brennan held that, where credibility and veracity are at issue, as here, "written submissions are a wholly unsatisfactory basis for decision." Goldberg, supra, at 269. As the only evidence by the Pine Mt. Club Property Owners Association here was by written declarations, it seems plain that the decision of the courts below must be reversed because the evidence does not "satisfy" the Due Process requirements. No State rule, nor court decision can alter these Constitutional requirements.

CONCLUSION

Petitioner, Kaschak was deprived of his right to confront and cross-examine the witnesses against him. The County argues Petitioner had an "opportunity to request" the court to exercise its discretion to allow such a hearing. By not applying, Petitioner waived his right. But Petitioner objected at every stage of this proceeding to being deprived of this right. The California Court rule turns Petitioner's right into a privilege granted on conditions; conditions superfluous to and in derogation of his right. The Court rule is, therefore, unconstitutional. Ample Federal authority exists for Petitioner's right,

a right which cannot be lost by the exercise of State Court discretion or State Court interpretation; a Federal question of general importance is presented herein. Hearsay declarations are offensive to the Constitution and the decision here, based on such declarations alone is itself unconstitutional. The right to confront and cross-examine witnesses whose testimony is used against him before Petitioner is deprived of (homesteaded) real property is a constitutional guarantee. The importance of Petitioner's right and the mere incidental burden on the court argues for a plenary rather than a summary hearing; a hearing denied here.

Additionally, as pointed out in the petition, not only did the Justice Court deny Petitioner the

right to cross-examine witnesses against him, but it then contradictorally and unevenly placed Petitioner under oath and offered him to his adversaries for cross-examination!

Finally, the county does not respond to the points raised in the petition that the denial of "due process" was perpetuated by the Appellate Court which did not refer to, nor pass upon Petitioner's denial of his rights to confront and cross-examine. Also, the court improperly ruled upon Petitioner's claim of judicial impropriety by holding a motion to recuse should have been made before the facts became known. The court misses this point. The hidden issue of whether the court below should have advised

the Petitioner of his right to confrontation and cross-examination, the issue tacitly raised by Petitioner's "proper" claims; is also not addressed. In other words, in a summary forfeiture proceeding, was not the court obliged to not only afford Petitioner the opportunity to cross-examine and confront the witnesses against him, if requested, but also to advise the Petitioner of these rights affirmatively, a la Miranda?

For all the foregoing reasons, and for the reasons advanced in the petition, Petitioner Kaschak asks the Supreme Court Of The United States to reverse the judgment below.

Respectfully submitted,

Richard G. Kaschak

Richard G. Kaschak
In Propria Persona

DATED: March 4, 1991